

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 1.03.2006

CORAM :

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

C.M.A.No.811 of 2006
and C.M.P.No.3161 of 2006

M/s.Indian MRI Diagnostic and
Research Centre
Plot No.762, West Main Road,
Anna Nagar, Madurai-625 020

... Appellant

vs.

1. The Customs, Excise and Service Tax
Appellate Tribunal,
South Zonal Bench,
26, Haddows Road,
Chennai-6

2. The Commissioner of Customs,
Office of the Commissioner
of Customs, Custom House,
Chennai-1

.. Respondents

Prayer: Appeal under Section 130 of the Customs Act under Section 35(a) of Central Excise Act against the Final order No.1341/2005 dated 26.9.2005 in Appeal Nos.C/474/99 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant :: Mr.G.Jeremiah

J U D G M E N T

(Judgment of the Court was delivered by P.D.DINAKARAN, J.)

The above appeal is preferred by the appellant under Section 130 of the Customs Act against the order dated 26.9.2005, made in appeal No.C/474/99 on the file of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), imposing penalty to the tune of Rs.1,00,000/- as enunciated under Section 112 of the Customs Act (herein after referred to as the Act), exercising powers conferred under Section 129A of the Act, for the alleged violation of Section 111-A of the Act in relation to the import of 'Whole Body CT.Scanner', raising the following substantial questions of law:-

"1. Whether the first respondent was correct in law in entertaining an appeal preferred by the second respondent against its own order.

2. Whether the first respondent having by its order No.763 of 2003 dated 5.8.2003 confirmed the order in original of the second respondent dated 24.8.1998 was correct in law in once again entertaining an appeal against the very same order.

3. Whether the first respondent's order violates the principles of res Judicata laid down in Section 11 C.P.C. and more so explanation IV.

4. Whether the second respondent could in law be considered an aggrieved person in view of the judgments of this Honourable Court reported in 1994(1) Law Weekly page 509 and 2004(1) Current Tamil Nadu Times page 187.

5. Whether the order of the first respondent imposing penalty is contrary to the decision of the Division Bench of the Bombay High Court reported in 2004(163) E.L.T.304(Bom) and the provisions of Section 143(2) of the Customs Act.

6. Whether the first respondent has in law correctly interpreted the provisions of Section 110, 111 and 112 of the Customs Act.

7. Whether the first respondent was correct in law in applying the provision of Section 114A of the Act, which provision was not on the statute at the material point of time having been introduced into the Act by Finance Act (No.2) Act 1996 (33 of 1996)

8. Whether the first respondent has correctly applied the law of limitation?."

2. It is apt to refer the relevant facts and circumstances of the case, in brief.

2.1. The appellant imported a "Whole Body Ct.Scanner" in the year 1990-91, which was released provisionally without payment of duty under Notification No.64/88-Cus dated 1.3.88 on production of Customs Duty Exemption Certificate issued by the Director General of Health Services (DGHS).

2.2. The exemption granted by the DGHS was later on withdrawn finding that the appellant institution was not a hospital but only a diagnostic centre and therefore, the appellant is not eligible for the benefit of the Notification dated 1.3.1988 referred to above.

2.3. Consequently, a show-cause notice was issued on 6.3.1998 by the Assistant Commissioner of Customs proposing to initiate confiscation proceedings and imposing penalty on the ground of violation of post-importation conditions of the Notification.

2.4. Admittedly, the Commissioner of Customs, in the adjudication of notice, passed an order dated 24.8.1998 imposing a redemption fine of Rs.23,61,039/- in lieu of confiscation of the goods, but unfortunately, has not imposed any penalty. Against the said order of redemption of fine dated 24.8.1998, the appellant preferred an appeal before the Tribunal. By an order 5.8.2003, the Tribunal dismissed the appeal filed by the appellant on the ground that the appellant institution was not a hospital but only a diagnostic centre as it was not, in any way, equipped to handle inpatients or outpatients. The Tribunal placing reliance on the decision of the Supreme Court in CC.NEW DELHI VS. CT.SCAN RESEARCH CENTRE(P) LTD (2003) (57) as well as the decision of the Andhra Pradesh High Court in KAILASH DIAGNOSTIC AND REHABILITATION CENTRE P.LTD., VS. DGHS REPORTED IN 2003(153) ELT 281, came to the conclusion that the appellant institution was not a hospital within the meaning of the Notification dated 1.3.1988 and consequently held that the appellant is not eligible for the benefit of exemption under the said Notification and accordingly, confirmed the order of the Commissioner of Customs dated 24.8.1998 imposing redemption fine to the tune of Rs.23,61,039/- in lieu of confiscation of the goods. Ofcourse, the appellant has challenged the order of the Tribunal in W.P.No.38385 of 2003. Therefore, we leave it open for the appellant to agitate its claim in the said writ petition.

2.5. In the meanwhile, by an order dated 2.8.1999, the Central Board of Excise and Customs(CBEC), initiated proceedings invoking powers conferred under Section 129D for imposing penalty under Section 112(a), 114A of the Act for the alleged violation to Section 111A of the Act in relation to the import of 'Whole Body CT Scanner' by the appellant in the year 1990-91 and ultimately finding that the appellant was not entitled for the benefit of the Notification No.64/88 dated 1.3.1988, the Board, under the provisions of Section 129D(1) of the Act, directed the

Commissioner of Customs to apply to the Customs, Excise and Gold(Control) Appellate Tribunal, to determine the following points:

(i) Whether in the facts and circumstances of the case read with subject show cause notice and especially when the importer has consciously evaded customs duty, the order of the Commissioner is Legal, correct and proper so far as it relates the non imposition of penalty on the importer; and

(ii) Whether by an order passed under Section 129B of the Act, the Tribunal should modify the order and pass an order imposing appropriate penalty on the importer under Section 114A of Section 112(a) or pass such other order as may be deemed fit and proper.

Pursuant to the said direction of the Board, the Customs, Excise and Service Tax Appellate Tribunal, by an order dated 29.9.2005, after hearing the appellant on 26.9.2005, thereby giving a fair and reasonable opportunity to the appellant in compliance with the principles of natural justice and relevant Rules, held the said questions affirmatively in favour of the Department and awarded a penalty of Rs.1,00,000/- under Section 112(a) of the Act for the alleged violation to Section 111A of the act.

2.6. Aggrieved by the said order, the appellant preferred W.P.No.43976 of 2005, but the same was dismissed by an order dated 21.12.2005 giving liberty to the petitioner/appellant to workout its rights by way of appeal under Section 130 of the Act. Hence, the present appeal.

3.1. The first contention raised by Mr.Jeremiah, the learned counsel appearing for the appellant is that the notice issued by the Board on 2.8.1999 is without jurisdiction, as the Board proposed to exercise the powers conferred under Section 114A of the Act, which came into force only on 28.9.1996, whereas, the impugned import taken place during the year 1990-91.

3.2. We are unable to appreciate the said contention for the simple reason that even though Sections 112(a) and 114A were referred to in the proceedings of the Board dated 2.8.1999, ultimately, the Board, in clear terms, had found that the appellant had committed a conscious violation of the conditions of the said Notification dated 1.3.1988 and therefore, the Commissioner ought to have imposed a proper penalty under Section 112(a) of the Act, which is available on the statute book at the relevant period of import namely, 1990-91. Therefore, the said contention fails.

4.1. The second contention raised by Mr.Jeremiah, the learned counsel for the appellant is that since the respondent/Department had already cancelled the bond executed at the time of provisional release of the

impugned imported goods viz., 'Whole Body CT Scanner', once again penalty under Section 129D cannot be imposed. In support of his contention he relied upon the decision of the Bombay High Court in BUSSA OVERSEAS AND PROPERTIES P.LTD. VS. C.L.MAHAR, ASSTT.C.C.BOMBAY 2004(163)e.l.t.304(Bom).

4.2. Though the learned counsel for the appellant raised the above contention, he is not in a position to place any materials before us as to the cancellation of the bond executed under Section 143 of the Act. On the other hand, it is an admitted fact that the impugned imported goods was provisionally released by the authorities concerned without payment of duty under Notification No.64/88-Cus.dated 1.3.1988 and on execution of a bond dated 20.06.1991 and later it was held that the appellant was not entitled for the benefit of the said Notification dated 1.3.1988. For the reasons already mentioned in the order dated 5.8.2003 of the Customs Excise and Service Tax Appellate Tribunal, referred to above, and since the imported goods was not available for confiscation, the imposition of redemption fine to the tune of Rs.23,61,039/-, cannot be questioned.

4.3.1. That apart, in the decision relied on by the learned counsel viz., BUSSA OVERSEAS AND PROPERTIES P.LTD. VS. C.L.MAHAR, ASSTT.C.C.BOMBAY 2004(163)E.L.T.304(Bom), the Bombay High Court in clear terms has held as follows:

"7. The power to levy penalty is not dependant upon availability of the goods imported or exported. The power to levy penalty arises because the importer or exporter has done or omitted an act in relation to goods and which renders such goods liable for confiscation. The power, in our judgment, to levy penalty is available once the Customs Authorities come to the conclusion that the goods imported or exported were liable to confiscation because of act or omission on the part of the importer or exporter as the case may be. The power is not dependant upon the availability of the goods. It is therefore not possible to accede to the submission of Shri Chagla that as the goods covered by 45 consignments were not available for confiscation under Section 111 of the Act, the Customs Department could not have commenced proceedings under Section 112 of the Act for levy of penalty.

4.3.2. Ofcourse, in the said decision, the Bombay High Court has also observed that once the conditions imposed by the Assistant Collector of Customs while securing the bonds under Section 143(1) are complied with within the stipulated period, then the conclusion is inescapable that the Assistant Collector of Customs had no jurisdiction to commence proceedings for confiscation of goods and levy of penalty under Sections 111 and 112 (a) of the Customs Act by issuance of show-cause notice. But, in our considered opinion, the above said observation of the Bombay High Court is in no way would improve the case of the appellant for two reasons:

(i) even though the learned counsel for the appellant submits that the bond executed by the appellant was subsequently cancelled, and the appellant could not produce any of such proceedings cancelling the bond executed.

(ii) on the other hand, the admitted fact remains that the appellant was not eligible for exemption under Notification dated 1.3.1988 and thereby, committed violation to Section 111A of the Act and therefore, the imported goods is liable to be confiscated under Section 111 of the Act, which gives a cause of action to impose a penalty under Section 112(a) of the Act; and

(iii) we are of the considered opinion that the power to impose penalty under Section 129 of the Act is still available, notwithstanding the availability of the goods imported or exported, which are liable to be confiscated on account of the act or omission on the part of the appellant, namely, the appellant availed the benefits under Notification dated 1.3.1988, even though they were not entitled for the same. Hence, the mere cancellation of the bond executed by the appellant by itself would not disable the authorities to initiate action under Section 129D to impose penalty under Section 112(a) of the Act.

5.1. The other questions raised by the learned counsel for the appellant are:

"1. Whether the first respondent was correct in law in entertaining an appeal preferred by the second respondent against its own order.

2. Whether the first respondent having by its order No.763 of 2003 dated 5.8.2003 confirmed the order in original of the second respondent dated 24.8.1998 was correct in law in once again entertaining an appeal against the very same order.

3. Whether the first respondent's order violates the principles of res judicata laid down in Section 11 C.P.C. and more so explanation IV.

4. Whether the first respondent has correctly applied the law of limitation?."

5.2. In this regard it is apt to refer Section 129A and 129D of the Act:

"129A. APPEALS TO THE APPELLATE TRIBUNAL

(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order-

- (a) a decision or order passed by the Commissioner of Customs as an adjudicating authority;
- (b) an order passed by the Commissioner(Appeals) under Section 128A;
- (c) an order passed by the Board or the Appellate Commissioner of Customs under Section 128, as it stood immediately before the appointed day;
- (d) an order passed by the Board or the Commissioner of Customs, either before or after the appointed day under Section 130, as it stood immediately before that day.

129D. POWERS OF BOARD OR COMMISSIONER OF CUSTOMS TO PASS CERTAIN ORDERS:

- (1) The Board may, of its own motion, all for and examined the record of any proceeding in which a Commissioner of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Boards in its order."

5.3. No doubt a show cause notice for initiating the confiscation proceedings was initiated on 6.3.1998, which ultimately ended in a redemption proceedings dated 24.8.1998, against which, the appellant has preferred an appeal under Section 112(a) of the Act before the CESTAT, which was dismissed by an order dated 5.8.2003. But, within the period of six months from 6.3.1998, the Board has initiated proceedings under Section 129D on 2.8.1999, well within the period of limitation.

5.4. It is settled law that the power conferred under Section 129A enables the aggrieved party to prefer an appeal against the order of the Collector, whereas under Section 129D the Board is empowered with the suo motu powers, not with reference to any application made by any party, to revise even any of the orders under this Act. It is also settled law that the phrase in 129D viz., 'points arising out of the decision' occurring in Section 129D(1) would include not only the errors committed by the Collector, but also omissions in his order. In the instant case, the Commissioner, by order dated 1.3.1988 found that the petitioner was not entitled to the benefit of exemption under the Notification dated 1.3.1988 and therefore, awarded a redemption fine to the tune of Rs.23,61,039/-, but committed an omission in not levying the penalty under Section 112 of the Act. Hence, the Board rightly invoked the power under Section 129D of the Act. Once there cannot be any dispute of such exercising of power under Section 129D, which is independent to the powers conferred under Section 129A, in our considered view, the contention that the powers under

Section 129D cannot be invoked merely because an order has already been passed under section 129A on 24.8.1998, will not hold good. Consequently, the plea of res judicata under Section 11 C.P.C. also fails. Therefore, all the above four questions fail.

6.1. With regard to the only remaining question viz., whether the second respondent could in law be considered as an aggrieved person, placing reliance on the judgments of this Honourable Court reported in 1994(1) Law Weekly page 509 and 2004(1) Current Tamil Nadu Times page 187, Mr.Jeremiah, the learned counsel fairly concedes that the decision referred to above is not applicable to the facts of the present case for the reason that the decision referred to above deals with the power of the Regional Transport Officer under the provisions of the Motor Vehicles Act, whereunder, concededly, no similar provision such as Section 129D of the Customs Act is available.

11. In view of the above conclusion, all the questions raised by the appellant fail and the appeal stands dismissed. No costs. Consequently, connected C.M.P. is dismissed.

msk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Customs, Excise and Service Tax
Appellate Tribunal,
South Zonal Bench,
26, Haddows Road,
Chennai-6

2. The Commissioner of Customs,
Office of the Commissioner of Customs, Custom House,
Chennai-1.

1 cc To Mr.G.Jermiah, Advocate, SR.10048.

C.M.A.No.811 of 2006

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